4, 1960, transferred the cause over plaintiff's objections to the Appellate Court, Third District. (Abst. 131), again without opinion; then on January 22, 1962, denied leave to appeal from the Appellate Court opinion contained in the Appendix. That opinion does not discuss the constitutional questions, but held, in effect, that the Railway Labor Act precluded the judicial remedy.

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT.

There is an area of complete confusion which now exists concerning the common law rights of railroad employees. Our understanding from *Moore v. Illinois Central Railroad Company*, 312 U. S. 630 at 634, 636 is that the employee has an alternative remedy—either to sue at common law or to apply to the Adjustment Board. This seems to have been confirmed in *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768.

The refusal to permit an employee to work is, for all practical purposes, a discharge—the failure to use the word "discharge" not changing the practical effect of the employer's act. *Del Buono v. Pennsylvania Labor Relations Board*, 370 Pa. 645, 89 A. 2d 323 at 326; *Schlueter v. School District No. 42 of Madison County*, 168 Neb. 443, 96 N. W. 2d 203; *Jameson v. Board of Education*, 78 W. Va. 612, 89 S. E. 255; *O'Brien v. Straight Filament Lamp Company*, 86 N. J. L. 352, 91 A. 100 at 101; *Burden v. Woodside Cotton Mills*, 104 S. C. 435, 89 S. E. 474 at 475. This Court reached an essentially similar result in the *Howard* case, to which reference is made above. In that situation, the railroad did not discharge the colored porters; it simply would not permit them to work.

There are several patent errors in the legal doctrines enunciated by the Illinois court which, intermixed with

its factual errors, cause considerable confusion. Let us straighten these out first, since they are conclusive against us if that court is correct and if we are in error.

The Appellate Court, in discussing the *Handley* case, states (32 Ill. App. 2d 103 at 110):

> "* * * the matter must be handled by negotiations and ultimately, in the process of adjustment, by the National Railway Adjustment Board * * *."

It goes on to adopt like reasoning for its own conclusion. Thus it states (p. 111):

> "* * * it is clear that the plaintiff, must be barred from pursuing his remedy in any court until he has exhausted his remedy under the remedies supplied by the Railway Labor Act * * *."

In other words, under the Illinois decision, proceeding before the Railroad Adjustment Board is held a condition precedent to suit in court. Under the *Moore* and *Howard* cases, where a wrongful discharge is involved, it is our interpretation of the law that these are alternative remedies. In fact, as this Court pointed out in *Union Pacific Railroad Company v. Price*, 360 U. S. 601, if we did proceed before the Adjustment Board, such would be a conclusive election of a remedy. Thus, if we proceeded before the Board and won, we would need no judicial remedy; if we proceeded before the Board and lost, we would have elected the administrative remedy in lieu of the judicial remedy.

In fact, if the Illinois courts were correct that the controversy would lie only before the Railroad Adjustment Board, there would be a complete lack of jurisdiction in the Illinois courts. All they could do would be to dismiss the suit without prejudice. Certainly summary judgment

for the defendant on the merits of the case could not be granted where jurisdiction would be lacking.

The Illinois decision also infers that the employee must exhaust his remedies within the organization, as provided by the labor contract. May we point out that there is no appeal procedure set forth in either the engineer's or firemen's contracts? Both of these set forth the procedure upon pages 37, 38 of the Abstract but provide no appeal mechanism—unless it be by reference to the field test, which we will discuss fully later. Under Illinois law (Ch. 110, § 101.13 (3)), the burden is on the defense to allege any failure to perform any condition precedent. The defense pleaded no appeal procedure, unless it be the field test, upon which it relies—and set forth no failure to fulfill any condition relating to administrative remedies.

Before going to the field tests, and the acts which we contend constituted a denial of due process, let us correct a few of the misstatements appearing in the Illinois court's opinion which otherwise could cause confusion:

> 1. (32 Ill. App. 2d 103 at 107): "* * * it would seem that both the unions representing the engineers and firemen, and the railroad recognize the importance of good color perception * * *"

We do not quarrel with this. But the defendant does not contend that the plaintiff did not have adequate color perception. Railroad signals deal only with primary colors (Abst. 47, 65, 66) as involved in the colored yarn tests, not the pastel shades of the Ishihara test. The defendant's officers admitted that one who could recognize those primary colors would be a safe employee (Abst. 66), that they knew Long could do so (Abst. 67), and that Long had never missed a signal in thirty-one years of service (Abst. 60).

And, in all events, when the contract existing between the union and the railroad prescribed a certain procedure of color testing under which the plaintiff had been accepted for employment, and which method of testing was followed uniformly for the next thirty-one years using the colored yarns test, the railroad had no power in violation of *U. S. C.*, Title 45, §§ 152, 156—by its unilateral action to change the tests without the notices and hearings provided by statute. It is admitted that compliance with this statute was not made (Abst. 84), Hallmann stating: "I authorized the change."

> 2. (32 Ill. App. 2d 103 at 107): "If plaintiff had been given only the Holmgren Yarns test he still would have failed."

This is the danger arising when courts forget the importance of jury trial and grant a summary judgment upon the basis of a single affidavit filed by a biased witness. Such would place all employees at the mercy of their employers and of the latters' paid examiners.

This remained a factual issue for jury determination. The jury was not bound to believe the defendant's medical examiner to the effect that Long had failed the Holmgren Worsteds test, first, because of the interest and bias of such witness; second, it was undisputed that such a color defect is congenital and does not vary throughout life—yet plaintiff had, as Dr. Murray admitted and defendant's medical records showed—passed satisfactorily all ten Holmgren Worsteds tests given to plaintiff over his thirty-one year span of employment by defendant. These facts appeared not only by counteraffidavits but by the very depositions attached in support of the defense motion for summary judgment. Therefore, the above was a conclusion of fact for a jury to determine—not for a reviewing court to decide.

3. The Illinois Court then stated (32 Ill. App. 2d 103 at 108):

> "* * * by the tests given him, plaintiff failed and was disqualified for service because of a color perception defect * * *."

Our answer to this is, simply:

A. The expression "by the tests given him" requires that the tests be legal tests. Under the statute, the carrier had no right unilaterally to change the procedures followed for over three decades without giving the statutory notice and holding hearings relative to changing from the Holmgren Worsteds to the Ishihara or "color dot" test.

B. If only the Holmgren Worsteds tests were proper, under the circumstances, then it was for the jury to determine whether Dr. Murray was being truthful in saying that Long failed the Holmgren test which Murray gave, when the visual condition is congenital, never varying, and with Long having passed every such test given for thirty-one years and with Long never having missed a signal in all that period of service. Credibility is fundamentally for the trier-of-fact, and not to be resolved by the affidavit of a biased employee.

4. Finally, the Illinois Court says, in effect, that the "field test" is an administrative requirement which the employee must fulfill before he can seek his judicial remedy (32 Ill. App. 2d 103 at 106, 107, 109). With this, we disagree for the following reasons:

A. If the Ishihara or pastel dot test was not a legal test, Long could not be disqualified by it.

B. If the basis for discharge was malicious, rather than for physical reasons, and this was tacitly ad

mitted by failing to join issue, Long could not be compelled to take a field test.

C. If the field test was manifestly capricious and arbitrary, it could not be used as a valid condition of continued employment.

D. If the employer waived the field test in the case of all employees other than Long having similar or worse visual defects (and this is undisputed), it cannot apply the test to him alone in order to deny him employment.

Let us discuss these matters at greater length, since they require a more specific analysis of the transcript. As we have stated, it is our contention that if the plaintiff was improperly disqualified, he could not be compelled to take a field test, whether it be reasonable or arbitrary. For thirty-one years, only the Holmgren Worsteds test had been used to test the color perception of all employees. The Railway Labor Act, 45 U. S. C. § 152 (7th) states:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 156 provides that no carrier may change any agreement affecting rules or working conditions without giving at least thirty days' written notice of such intended change and a time and place for a conference between representatives of the parties interested in such intended changes.

Defendant did not contend in any of its pleadings, affidavits, or exhibits that it complied with such statutory requirements. Instead, it admitted that such was a purely unilateral action on its part. Its personnel supervisor, Hallmann, testified: "I authorized the change" (Abst. 84).

If, then, the change to an Ishihara test, on the basis of which plaintiff was disqualified, was illegal, plaintiff could not be required to take a field test in order to prevent his discharge. He would have a right to refuse to take such field test, which he did.

Even if the plaintiff had been disqualified in a proper manner, we submit that the field test requirement here was illegal for two reasons: (1) Its requirements were so manifestly unfair and arbitrary as to place the employees wholly at the defendant's mercy; (2) The defendant had waived the field test requirement in the instance of all other employees with like physical conditions but with far less imposing work records. It had no right to insist upon the requirement as to Lawrence Long in order to effect a malicious discharge (and the facts in plaintiff's affidavit in this regard were not disputed in any way by the defendant).

Circular 18 (Abst. 36) provides as to such field test, in part:

"10. Should the examination disclose a defective color perception, vision or hearing such as might make necessary the employe's withdrawal from the service engaged in, the Chief Surgeon will so notify the superintendent, and he, in turn, will notify the employe. If not satisfied with the examination the employe may appeal to the superintendent, in writing, for a field test. Such a test to be held within five (5) days after receipt by the superintendent of the appeal. The field test will be final, and the employe disqualified will not be given a second field test. The employe concerned will be advised result of the field test without unnecessary delay, and 100% perfect is necessary to satisfactorily pass a field test.

"12. Field tests will be conducted under the supervision and direction of the superintendent or his repre-

sentative, and the Company Surgeon or his representative.

"13. Any person in *service of the company* selected by the employee to be examined may be present at the field test." (Italics supplied.)

Hallmann testified in his deposition as to the field test (Abst. 80-82):

Q. Is it not true that one of the representatives who conducts the tests is either the superintendent or his representative? Is that correct, sir?

A. That is correct.

Q. Isn't such a person an employee of the Illinois Central Railroad Company?

A. That is correct.

Q. Isn't another person who conducts the field test the company surgeon or his representative?

A. That is correct.

Q. And isn't that person paid by the defendant Illinois Central Railroad Company?

A. That is correct.

Q. And the person whom the employee is entitled to bring along must be a railroad employee?

A. Oh, yes.

Q. He could not be, under the rule at least, an independent physician or ophthalmologist, is that correct?

A. That is correct.

Q. Or, under the rule, he would not be his attorney?

A. Unless he was a company attorney. We have them, too. * * *

Yet the transcript shows without dispute that a field test was waived in the case of all other employees with color or visual defects. For example, Engineer W. C. Ralls (Abst. 88) was disqualified from service by reason of the fact that he was blind in his right eye. Upon April

14, 1958, the traveling engineer recommended that an exception be made to permit this man to continue in service as a fireman, and such recommendation was adopted by the superintendent upon May 5, 1958. Upon May 22, 1958, the traveling engineer stated that he had never removed him from the job, and upon June 2, it was asked by the superintendent whether Mr. Ralls was still operating a locomotive in main line service though blind in his right eye. Upon June 3, 1958, the chief surgeon stated that the employee had been re-examined and was found still disqualified. On June 10, 1958, the superintendent recommended that he be permitted to continue work as a fireman, and on June 16, 1958, this was authorized by the general manager. No field test was required (Abst. 88, 92, 94 96, 98).

John English, Jr., on January 18 was disqualified from service because of defective color perception (Abst. 88). On March 18, 1954, the assistant superintendent requested that an exception be made to permit him to continue in service, which recommendation was echoed upon March 23, 1954, by the superintendent. On March 31, 1954, the general manager made such an exception. Even though, upon March 17, 1958, upon medical re-examination, he was found still disqualified, no field test was required (Abst. 88, 89, 92, 98, 106, 107).

Fireman Francis Stokowski (Abst. 87) is shown by his personnel record to have been disqualified upon February 2, 1954, because of defective color perception. Again, he was permitted to return to service although he failed to pass a pseudo-isochromatic test upon re-examination. No field test was required (Abst. 87, 92, 98).

Noble G. Williams (Abst. 90, 92, 96, 98) was found to have defective color perception and disqualified. He was re-examined and again disqualified. Nevertheless, he was

retained in service with no field test having been given or passed.

Engineer E. B. Ricks was disqualified upon February 6, 1951, for defective color perception. Upon re-examination he still could not pass the pseudo-isochromatic test. No field test was given and he was retained in service (Abst. 87, 92, 93, 98, 99, 102, 104, 105).

Here is Engineer Ricks' record (Abst. 62-64):

"10 demerits—Suspended, failure to report for duty.
20 demerits—Concern in derailment at Centralia.
30 demerits—Concern in collision at Decatur in which passenger train collided with yard engine.
10 demerits—Carelessness displayed in backing into train.
50 demerits—(Apparently violation of Rule G-800, 803 and 805).
30 demerits—Concern in Peoria District Accident No. 2.
30 demerits—Concern in Clinton District Accident No. 8.
5 demerits—Running regular stop on Train No. 135.
15 demerits—Violation Rule 509—A Stop 'Block at Stop'.
30 demerits—Failure to observe stop and proceed signal displaying Stop indication, passing at excessive speed.
10 demerits—Failure to restrict speed in accordance with 15 upon explosion of torpedoes.
15 demerits—Concern Clinton District Accident No. 3—violation of 1st and 2nd paragraph of Gen. Notice and Rules 34 and 700.
15 demerits—Violation Trans. Rules 104-989—Running through North Cross-over, Switch engine 2136 train 172 between Leafland and Grand Avenue (Decatur).

(no demerits)—Violation first four paragraphs of General Notice in Trans. Rule Book—3rd and 4th paragraphs of Rule 104, Rules 106, 700 and 989 in connection with derailment of yd. engine 1725 on Old Pass between Marietta & Condit Streets, Decatur."

Compare this to the record of Engineer Lawrence Long. Hallmann stated (Abst. 60):

Q. Are there any demerits shown in that personnel file of Lawrence Long?

A. No, Mr. Long has what we call a perfect record, a perfect record being a record in which there are no demerit marks.

In fact, just four months before the change in color perception tests, Lawrence Long received the following commendation upon September 28, 1953, from Wayne A. Johnston, Jr., (Abst. 61, 62):

"Dear Mr. Long:

"I understand that you found and reported a broken rail in No. 10 track, 'A' yard, Clinton, on September 15 and that examination showed approximately 14 inches of the ball of rail gone and rail broken in the web and base.

"I want to thank you for your alertness and prompt action in reporting this broken rail as no doubt a serious accident was avoided. A suitable notation will be placed on your record."

The Appellate Court then made this erroneous statement (32 Ill. App. 2d 103 at 107) as to the above employees:

"Apparently the railroad company officials and surgeons believed these men could continue to work and upon re-examination • • • they were permitted to work."

Upon re-examination, these men were not medically cleared. Dr. Murray testified that, upon re-examination, each of the above employees was found still to be disqualified (Abst. 87); that each of the employees resubmitted (including Williams and Stokowski) to pseudoisochromatic color tests failed such tests (Abst. 90, 91, 106, 108); that Ricks and Ralls remained medically disqualified on re-examination (Abst. 94, 95); and nothing in the defendant's medical files shows that the medical department was consulted upon the defendant's decision to retain these men in service (Abst. 89) despite their physical and medical disqualifications. Accordingly, the above statement of the Illinois court is not substantiated by the record, but the decision to permit these men to remain in service was an arbitrary one, made by management, without requiring them to submit to field tests.

A man's right to work is as much his property as his house, his automobile, or his bank account. We do not believe an employer has a right suddenly to discharge him, nor to refuse him the right to work, after thirty-one years of service by changing unilaterally the conditions of his employment, by imposing unfair and arbitrary tests over which it alone can exercise control, or by requiring such tests of one man, which tests it waives as to its other employees. The law does not contemplate such an inconsistent and unfair administration of his working rights because of the honorable discharge of his duties while attached to a federal regulatory commission. If such coercion could be utilized by the railroads, few violations would be reported by employees required to return to their railroad employment after detached duty has ended.

SUMMARY.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgments and orders of the Appellate Court of Illinois as confirmed by the Supreme Court of that State, by denial of the petition for leave to appeal.

Respectfully submitted,

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APPENDIX.

OPINION OF APPELLATE COURT.

Reynolds, J.

Plaintiff claims wrongful discharge. Defendant contends plaintiff was not discharged, still holds seniority as a fireman and locomotive engineer, but is disqualified for service because of a defect in color perception. Plaintiff had worked for the defendant railroad company for about 25 years and from time to time had passed physical examinations as required by the company. In February 1954, he was given a test for color perception and failed to pass. He was re-examined in April 1954 and again failed to pass. On May 7, 1954, the railroad company notified plaintiff he was disqualified for further service as a fireman or locomotive engineer. The plaintiff took the matter up with his union, the Brotherhood of Locomotive Engineers and was advised by officials of the union he should take a field test. Plaintiff failed or refused to take the field test, but wrote a letter to the superintendent of the railroad company at Clinton, Illinois, admitting the defect in color perception but claiming it was minor and he could properly perform the duties of a fireman. This request was refused by the company. Whether before or after, the time not being clear, the plaintiff then applied for and began receiving his railroad retirement pay. Some time in 1958, plaintiff brought the present suit.

No testimony was taken and the issues are presented by the pleadings, affidavits and exhibits. While there are many side issues, it would seem the vital issues in this cause can be reduced to these questions. 1. Was there a wrongful discharge? 2. Assuming there was a wrongful discharge, is the plaintiff compelled to exhaust his administrative remedies before bringing suit? Determination of

those questions will dispose of the many collateral and side issues of the cause.

The first question of wrongful discharge must depend upon the questions of discrimination, the method of examination, the failure of the plaintiff to take the field test, his election to take his retirement, and the fairness of the field test. In considering these questions, it must be recognized that an employer, even though under the Railway Labor Act, owes no duty to an employee to keep him employed, except by contract. There is no common law right of the employee to employment by the railroad, but a contractual right, established by the contract between the railroad and the unions, and the employee has no right of action, except for a breach of that contract. Here both the employee and the railroad were bound by the terms of that contract. Article 39 of the Firemen contract provides for the handling of grievances. The procedure is outlined in detail. Article 50 of the Engineer contract outlines the procedure for hearing of charges against an engineer. There is nothing in the record to show that any of the provisions of either of these articles were used by either the employer or the employee. The railroad contends that the plaintiff was disqualified for service because of his color perception defect, that he has not been discharged, and that he still retains his seniority rights. This distinction is important here, since there were no charges preferred against plaintiff at any time, there was no hearing or request for hearing, and no reported grievance to be adjudicated. Plaintiff, in his letter to the superintendent of the railroad company, at Clinton, Illinois, under date of August 9, 1954, apparently recognized that his remedy was by way of his union, and by appeal from the order of the railroad disqualifying him for service as a fireman or engineer. However, he did not appeal. He bases his refusal to take the field test upon the ground that such a test is unfair. This field test is provided for in

Circular No. 18 of the railroad company adopted January 1, 1928, and in force in 1954, which provides that should the examination of the employee disclose a defective color perception, making necessary the employee's withdrawal from the service engaged in, the employee should be notified. If not satisfied with the examination the employee may appeal to the superintendent in writing, for a field test. 100% perfect is necessary to satisfactorily pass a field test. The field tests are to be conducted by the superintendent or his representative, the company surgeon or his representative, and at the field test any person in service of the company selected by the employee may be present. This rule of the company as to field tests has been in effect for many years and while requiring a rigid 100% grade, this fact alone of that the person selected by the employee must be an employee of the company, does not, make the test unfair. The rule itself may be too rigid, or require too much, but it has apparently been recognized and accepted by the unions, for a long time. Since the correct reading of color signals is highly important to anyone connected with railways, it would seem that both the unions representing the engineers and firymen, and the railroad recognize the importance of good color perception and the employer has the right to insist upon its employees possessing good or near perfect color perception.

Plaintiff contends that he had passed many times, the Holmgren Worsted test which is by colored skeins of yarn. He contends that the giving of the other tests, the pseudo isochromatic plate test, the Ishihara plate test, the Hardy Rand Rittler plate test and the Williams lantern tests, constituted a new and different type of test and as such was a change of the rules and constituted a wrongful discharge. Yet the record shows that plaintiff was given the Holmgren yarn test along with the other test. Plaintiff missed 10 of the 18 test plates of the pseudo-isochromatic

test, all of 12 Ishihara test plates, 11 of 14 Hardy Rand Rittler test plates, 9 of 68 lights in the Williams lantern test; and 7 out of 20 of the Holmgren Worsted yarns. If plaintiff had been given only the Holmgren yarns test he still would have failed.

Plaintiff put into the record defects of color perception of other engingers and firemen in support of his claim of discrimination. The nature and extent of the defects in color perception of these men is not shown and this court cannot say whether the same extent of defect of color perception existed with them as was shown to exist in the plaintiff. Apparently the railroad company officials and surgeons believed these men could continue to work and upon re-examination or recommendation of the superintendent they were permitted to work. Nevertheless, their working or not working does not change the fact that by the tests given him, plaintiff failed and was disqualified for service because of a color perception defect, sufficiently defective that the railroad surgeons and officials determined he could no longer perform the duties of fireman or engineer.

On the basis of this record, it seems evident that the plaintiff was not wrongfully discharged but was disqualified in accordance with company rules.

Even if the question of wrongful discharge was inconclusive, or the plaintiff was wrongfully discharged, the question whether he should have exhausted his administrative remedies before instituting the present suit remains to be determined. As we have said, there was no grievance presented, either to the union or to the Railroad Adjustment Board. The plaintiff asked for reconsideration of his disqualification, which was denied, refused to take a field test, took his pension and later entered suit.

Plaintiff relies upon *Moore v. Illinois Central Railroad Company*, 312 U.S. 630, in support of his contention that

he need not exhaust his administrative remedies before bringing suit. That case held that there was nothing in the Railway Labor Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge, or to make an administrative finding a prerequisite to filing a suit in court. That case further held that a plaintiff was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for a wrongful discharge. The Moore case originated in the State of Mississippi. The case of *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, sustains the *Moore v. Illinois Central Railroad Company* case, and holds that the Railway Labor Act does not bar courts from adjudicating wrongful discharge cases. However, in other cases, the doctrine of the *Moore v. Illinois Central Railroad Company* case has been distinguished to apply only if the state of origin does not require the exhaustion of administrative remedies as a prerequisite to suit. The case of *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, says that an employee is not precluded by Railway Labor Act from resorting to a state recognized cause of action for wrongful discharge, but that, in such action he must show exhaustion of his administrative remedies under his contract provided the applicable state law so requires. This is true, even though employer is carrier subject to the Railway Labor Act. The employee in that case was charged with abuse of his sick-leave privileges. A hearing was had on the charges and the employee attended the hearing, and upon the hearing officer ordering him to be discharged, he resigned "under protest". He took no appeal, but brought suit, and the court held he must first exhaust his administrative remedies.

The case of *Anson v. Hiram Walker & Sons*, 222 F. 2d 100, takes note of the doctrine of the Moore case, but says: "Where the applicable law permits his recovery

of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law. On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so." (Citing *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653.) And the court, continuing, said: "In Illinois it is well settled that where a member of a union or other association brings suit and if appears that his remedies are governed by laws and regulations of the association to which he belongs, he must, before he can succeed, show that he has exhausted all of the remedies provided by those laws and regulations."

There are a number of Illinois cases that state the rule in Illinois, but two recent cases have re affirmed the rule as stated by Judge Lindley in the *Anson v. Hiram Walker & Sons* case. *Payne v. Pullman Co.*, 13 Ill. App. 2d 105; *McMahaman v. Elgin, J. & E. Ry. Co.*, 25 Ill. App. 2d 449.

The recent case of *Handley v. Illinois Central Railroad Company*, 272 F. 2d 752, involved a suit for wrongful discharge, amended to wrongful removal from service. The plaintiff was a telephone operator on the switchboard of the railroad at Fulton, Kentucky. By reason of technological improvements the switchboard at Fulton was discontinued. Plaintiff, with others, was furloughed but offered a position at other points of the railroad company, one nearby, at Paducah, Kentucky. Some of the other telephone operators took positions elsewhere, but plaintiff refused. However, she retained her pass on the railroad and carried her group insurance as a furloughed railroad employee. She was a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The court held that under

the collective bargaining or working agreement between the union and the railroad, the matter must be handled by negotiations and ultimately, in the process of adjustment, by the National Railway Adjustment Board, in accordance with the provisions of the Railway Labor Act. The suit was dismissed.

Here, the plaintiff was not discharged, but disqualified for service. Other than reporting his disqualification to his union, and requesting to be reinstated, he did nothing further to pursue his remedies under the administrative provisions of the contract between his union and the railroad company.

In view of the law in Illinois, as recognized by the Federal courts, it is clear that the plaintiff, must be barred from pursuing his remedy in any court until he has exhausted his remedy under the remedies supplied by the Railway Labor Act and the collective bargaining contracts made in pursuance thereof. The judgment will be affirmed.

Affirmed.

Roeth, P. J., and Carroll, J., concur.

FINAL JUDGMENT ENTERED JANUARY 22, 1962 BY THE SUPREME COURT OF ILLINOIS

. . . And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

CONSTITUTION OF THE UNITED STATES.

ARTICLE XIV.

"§ 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

45 U. S. C., § 152:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

45 U. S. C., § 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representative of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has

elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Moore v. Illinois Central Railroad Company, 312 U. S. 630 at 633, 636, 61 S. Ct. 754, 85 L. Ed. 1089:

". . . we find nothing in the Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . . It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties,' or by either party . . .' This difference in language, substituting 'may' for 'shall' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based upon a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustments and mediation voluntary in its nature. (citing H. Rep. No. 328, 69th Cong., 1st Sess., p. 4). The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy by the Railway Labor Act as a prerequisite to suit for wrongful discharge."